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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

LYNN LAZDOWSKI, Plaintiff and Appellant, v. BOWNE OF LOS ANGELES, INC., BOWNE & CO., INC. AND GREGORY WIEDBUSCH, Defendants and Respondents.	B169467 (Los Angeles County Super. Ct. No. BC277475)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ernest M. Hiroshige, Judge. Affirmed.

Fuchs & Associates, Inc., John R. Fuchs and Gail S. Gilfillan, for Plaintiff and Appellant.

Silver & Freedman, Barry M. Appell and Beth A. Schroeder, for Defendants and Respondents.

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Plaintiff and appellant Lynn Lazdowski (appellant) appeals the trial court's entry of summary judgment in favor of defendants and respondents Gregory Wiedbusch (Wiedbusch), Bowne of Los Angeles, Inc. (Bowne), and Bowne & Co., Inc. (collectively, respondents), in appellant's action for wrongful termination; sex, race, and disability discrimination; retaliation for opposing unlawful practices; sexual harassment; failure to prevent discrimination and harassment; and intentional and negligent infliction of emotional distress. Summary judgment was properly granted. Appellant's claims for sexual harassment, sex, race, and disability discrimination, and intentional and negligent infliction of emotional distress are barred in significant part by the applicable statutes of limitations. The only incidents that occurred during the relevant limitations periods -- appellant's discharge and Bowne's failure to assist her in obtaining disability and worker's compensation benefits – are not actionable under any theory appellant has asserted. We therefore affirm the judgment of the trial court.

BACKGROUND

Appellant was employed by Bowne, a wholly owned subsidiary of Bowne & Co., Inc., from December 1997 to July 16, 2001. Appellant had previously been employed by Bowne of Boston, another subsidiary of Bowne & Co., Inc., before transferring to Bowne's Los Angeles office. In June 2000, appellant took an unpaid leave of absence because of certain health problems.

During her leave of absence, appellant moved back to Massachusetts and had little contact with her Bowne co-workers. In July or August 2000, she returned to California briefly to meet with her supervisor, Wiedbusch, and told him that her health problems were continuing and that she was still unable to return to work. Wiedbusch told appellant, "Take all the time you need." At Bowne's request, appellant's doctors periodically provided Bowne with letters stating that appellant's leave should be continued, but the letters did not state when appellant might be able to return to work.

Appellant did not return to work, and on July 16, 2001, Bowne terminated her employment.

Appellant filed charges of harassment and discrimination with the California Department of Fair Employment and Housing (DFEH) on July 11, 2002. On that same day, appellant initiated this action. In her first amended complaint, appellant alleged that she was employed by Bowne from December 1997 through July 16, 2001 and that throughout this time period she "was discriminated against on the basis of her gender (female), discriminated against on the basis of her race (Caucasian), discriminated against on the basis of her mental and physical disabilities, sexually harassed, subjected to a hostile work environment, and subjected to illegal employment practices . . ." Appellant further alleged that respondents' discrimination and harassment continued throughout her leave of absence from June 2000 through July 16, 2001. She asserted causes of action for wrongful termination; sex, race and disability discrimination, in violation of the California Fair Employment and Housing Act (Gov.Code, § 12940 et seq., (FEHA)); retaliation for opposing unlawful employment practices; failure to prevent discrimination and harassment in employment; breach of contract; violation of Labor Code section 970; and intentional and negligent infliction of emotional distress.

Respondents moved for summary judgment on the grounds that appellant's causes of action for sexual harassment, sex and race discrimination, breach of contract, violation of Labor Code section 970 and intentional and negligent infliction of emotional distress were time barred; that appellant failed to establish a prima facie case of race, sex, or disability discrimination; and that appellant's claims for wrongful termination and retaliation failed as a matter of law because Bowne had a legitimate, non-discriminatory reason for terminating appellant's employment, and appellant could not establish that this reason was pretextual and that the real reason for her termination was retaliatory. Respondents also sought an award of their costs and attorney fees pursuant to Government Code section 12965, subdivision (b).

In support of their motion, respondents filed a separate statement of undisputed material facts setting forth the dates of appellant's employment, leave of absence, and termination, and the time period during which the alleged acts of harassment and discrimination occurred. Respondents' separate statement is supported by appellant's deposition testimony, excerpts of which were filed in conjunction with respondents' motion; the declarations of Isabel Candelas, an employee in Bowne's human resources department, and Philip Kucera, Bowne & Co., Inc.'s Senior Vice President and General Counsel; and copies of relevant portions of Bowne's family care leave of absence policy and its medical leave policy. Bowne's family care leave of absence policy states that employees are allowed unpaid leave time of up to 12 weeks over a 12-month period for "a serious health condition that renders the employee unable to perform the essential functions of the job . . ." Bowne's medical leave policy states: "[T]here shall be no guarantee of re-employment when the employee is absent for a continuous period that exceeds 4 months, or for a cumulative 4 month period within a one-year span."

Appellant opposed respondents' motion and submitted her own separate statement of disputed and undisputed material facts. Appellant's separate statement is supported in large part by her own 45-page declaration,[1] and also by the declarations of her attorney and a human resources expert, Marcia Haight. Appellant's declaration describes numerous incidents of sexual harassment that purportedly occurred at Bowne between October 1997 and June 2000. These incidents include unwanted sexual advances from a male co-worker in 1997; an unwanted kiss from another male co-worker in 1999; and comments of a sexual nature made by both male and female co-workers. Appellant states in her declaration that she did not complain about the harassment to her supervisor because she was afraid of retaliation, and that she did not complain to anyone in Bowne's

[1] Respondents argued on appeal that appellant's declaration was defective because it was not made under the laws of the state of California. (Code Civ. Proc., § 2015.5; *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 618.) Respondents did not, however, object to appellant's declaration on this ground in the trial court.

human resources department because she "knew that nothing would be done about it." Appellant's declaration cites the following as acts of sex and race discrimination against her: her use of a relatively old computer; her purportedly heavier workload than other male or minority employees; instances when Wiedbusch yelled at appellant because of her job performance, but did not similarly berate other employees; Wiedbusch's unfriendly behavior toward her in contrast to his "exceptionally friendly and jovial" manner with male employees; and that she was one of "three and possibly four" women whose employment at Bowne was terminated while on medical leave. In her declaration, appellant claims that she requested an off-site meeting with a human resources manager to discuss her problems with Wiedbusch; that the manager refused to meet with her off-site; and that appellant cancelled an onsite meeting she had scheduled with the manager. Appellant also alleges in her declaration that while working at Bowne, she discovered fraudulent billing practices and learned that Bowne was unlawfully withholding overtime compensation from its employees. She states that she complained about the billing and overtime practices and maintains that she was terminated in part because of her complaints. Appellant's declaration states that it was executed in Salem, Massachusetts.

Ms. Haight's declaration contains her opinion that Bowne's human resources policies and procedures to prevent discrimination and harassment were inadequate; that Bowne's policies and procedures for medical and disability leave were deficient and did not comply with the federal Family and Medical Leave Act and the California Family Rights Act; that appellant was unlawfully terminated; that sex and race discrimination existed at Bowne; and that appellant "believes that her reporting of unlawful practices was one of the reasons she was terminated . . ." Respondents filed evidentiary objections to both appellant's and Ms. Haight's declarations, on various grounds, including lack of foundation and personal knowledge. The record contains no ruling by the trial court on the evidentiary objections or the admissibility of the declarations.

Respondent's motion was heard on May 28, 2003. At the outset of the hearing, the trial court issued a tentative ruling granting summary judgment in favor of

respondents. Following argument by the parties, the trial court took the matter under submission and subsequently issued an order entering summary judgment in favor of respondents. The court took under submission respondents' request for an award of their attorney fees and costs pursuant to Government Code section 12965, subdivision (b)[2]. The trial court subsequently denied respondents' motion for attorney fees and costs, and respondents have not appealed that ruling. In the order granting summary judgment, the trial court noted that appellant's separate statement was deficient because the assertions contained therein were "far too general and conclusory" and because the description of the evidence in support of those assertions was inadequate in that it was "generalized and vague." Appellant contends that the trial court abused its discretion by granting summary judgment solely on the basis of any procedural defect in appellant's separate statement. (See Code Civ. Proc., § 437c, subd. (b)(3)). Appellant appeals the judgment, with the exception of the trial court's rulings on her causes of action for breach of contract and violation of Labor Code section 970, which rulings she does not challenge.

DISCUSSION

A. Standard of Review

Summary judgment is granted when a moving party establishes the right to entry of judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

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[2] We grant appellant's motion, pursuant to California Rules of Court, Rule 12(a), to augment the record on appeal to include the transcript of proceedings at the September 4, 2003 hearing on respondent's motion for attorney fees and costs, and the minute order dated September 8, 2003 denying that motion.

A defendant moving for summary judgment bears the initial burden of proving that there is no merit to a cause of action by showing that one or more elements of the cause of action cannot be established or that there is a complete defense to that cause of action, such as the statute of limitations. (Code Civ. Proc., § 437c, subd. (p)(2); *Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1037 (*Cucuzza*).) Once the defendant has made such a showing, the burden shifts to the plaintiff to show that a triable issue of one or more material facts exists as to that cause of action or as to a defense to the cause of action. (*Aguilar v. Atlantic Richfield Co., supra,* 25 Cal.4th at p. 849.) If the plaintiff does not make such a showing, summary judgment in favor of the defendant is appropriate. In order to obtain a summary judgment, "all that the defendant need do is to show that the plaintiff cannot establish at least one element of the cause of action . . . . [T]he defendant need not himself conclusively negate any such element . . . ." (*Id*. at p. 853.)

On appeal from a summary judgment, an appellate court makes "an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court in determining whether there are any genuine issues of material fact or whether the moving party is entitled to judgment as a matter of law." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222.)

B. FEHA Claims for Sexual Harassment, Sex, Race and Disability Discrimination

Appellant's sexual harassment and sex, race, and disability discrimination claims are governed by FEHA. Subdivision (a) of Government Code section 12940 provides in relevant part: "It shall be an unlawful employment practice . . . [¶] (a) [f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person

from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

1. Statute of Limitations and Continuing Violations Doctrine

Subject to exceptions not applicable here, FEHA requires complainants to file an administrative complaint within one year of the date upon which the alleged unlawful practice occurred. (Gov. Code, § 12960.) Filing an administrative complaint is a prerequisite to suit under the statute. (*Balloon v. Superior Court* (1995) 39 Cal.App.4th 1116, 1120.) Appellant filed her administrative complaint on July 11, 2002. She therefore may sue regarding discriminatory or harassing acts that occurred on or after July 11, 2001. (Gov. Code, § 12960.) Appellant's employment was terminated on July 16, 2001. She must accordingly establish that actionable conduct occurred between July 11, 2001 and July 16, 2001 in order for her FEHA claims to survive the statute of limitations.

Appellant contends she established actionable conduct by respondents within the statutory limitations period, citing her first amended complaint and paragraphs 18 to 63 of her declaration. Appellant cannot rely on the allegations in her own complaint, however, to oppose a motion for summary judgment. (*Arauz v. Gerhardt* (1977) 68 Cal.App.3d 937, 940-941.) Nearly all of the incidents described in appellant's declaration occurred before July 11, 2001 and are therefore time barred. (Gov. Code, § 12960.) Appellant's declaration alleges only two incidents that occurred on or after July 11, 2001 – her July 16, 2001 termination and Bowne's purported failure to assist her in obtaining disability and worker's compensation benefits. Appellant has failed to establish that either of these two incidents is actionable under FEHA.

Appellant argues that the continuing violations doctrine permits her to sue for discriminatory and harassing conduct that occurred before July 11, 2001 and that would otherwise be time barred. The continuing violations doctrine permits suit under FEHA for conduct that occurred in part outside the limitations period. (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 802 (*Richards*).) The doctrine may only be invoked,

however, if some actionable conduct occurred within the limitations period. In order for the continuing violations doctrine to apply, "[t]he plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." [Citations.]'" (*Morgan v. Regents of the University of California* (2000) 88 Cal.App.4th 52, 64 (*Morgan*).) Conduct that would otherwise be time barred must also be related to that occurring within the statutory filing period by being sufficiently similar in kind, occurring with sufficient frequency and not having acquired a degree of permanence so that the employee is on notice that further informal efforts to obtain accommodation or end harassment would be futile. (*Richards, supra,* 26 Cal.4th at p. 802.) As discussed *post,* appellant has failed to establish that the continuing violations doctrine applies.

2. Appellant's Termination

Appellant claims that her July 16, 2001 discharge was an unlawful act of discrimination. To establish a prima facie case of discrimination, an employee must provide evidence that (1) she was a member of a protected class, (2) she suffered an adverse employment action, such as termination, and (3) circumstances that suggest a discriminatory motive. (*Cucuzza, supra,* 104 Cal.App.4th at p. 1038.) An employer seeking summary judgment in a discrimination case meets its burden by showing that one or more of these prima facie elements is lacking, or that legitimate, non-discriminatory reasons existed for the employee's discharge. Following such showing by the employer, the burden shifts to the employee to demonstrate that the reasons for termination are a pretext and that the employer acted with a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355-356 (*Guz*).) "Pretext may be inferred from the timing of the discharge decision, the identity of the decisionmaker, or by the discharged employee's job performance before termination." (*Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 224.) An employee may raise a triable issue of fact regarding pretext by presenting evidence of implausibilities, inconsistencies, or contradictions in an employer's proffered reason, or with direct evidence of a discriminatory motive. (*Guz,*

supra, 24 Cal.4th at pp. 356, 363.) To raise a triable issue of fact, however, the employee's evidence must do more than present a "weak suspicion" that discrimination was a likely basis for the termination. (*Id.* at pp. 369-370.)

Bowne has presented a legitimate, non-discriminatory reason for terminating appellant's employment – her 13 month leave of absence, longer than either the 12-week or 4-month period specified in Bowne's family leave and medical leave policies, with no indication that she would be able to return to work. Appellant's declaration in opposition to respondent's motion states that her discharge "was absolutely part of the harassment, abuse and discrimination based on race and gender that had been inflicted upon me by Wiedbusch and others at Bowne of Los Angeles since October of 1997;" however, she offers no facts or evidence to show that her termination was motivated by any harassing or discriminatory animus. "A motion for summary judgment must be decided on admissible evidence in the form of affidavits, declarations, admissions, answers to interrogatories, depositions and matters of which judicial notice may be taken." (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1119-1120.) "'Personal knowledge and competency must be shown in the supporting and opposing affidavits and declarations. [Citations.] [¶] The affidavits must cite evidentiary facts, not legal conclusions or "ultimate" facts. [Citation.] [¶] Matters which would be excluded under the rules of evidence if proffered by a witness in a trial as hearsay, conclusions or impermissible opinions, must be disregarded in supporting affidavits. [Citations.]'" (*Id.* at p. 1120.)

Appellant was absent from the workplace during the 13 months preceding her termination and, in fact, relocated to Massachusetts soon after commencing her leave of absence. She admits that she had little, if any, contact with other Bowne employees during that time. Appellant's meeting with Wiedbusch in July 2000, during which Wiedbusch allegedly told her to "take all the time you need," and the alleged failure to fulfill that promise do not indicate discriminatory intent or animus.

The declaration of appellant's human resources expert, stating that Bowne had no written policy or procedure setting a maximum time for unpaid disability leave, raises no

triable issue of material fact concerning any discriminatory motive for appellant's termination. Appellant's claim that Bowne, with the help of an attorney, "orchestrated" her termination to occur after the statutory period had run on her FEHA causes of action is insufficient to raise a triable issue of material fact concerning race, sex, or disability discrimination. The timing of appellant's discharge, occurring many months after the 12-week or 4-month periods allowed for unpaid leave of absences in Bowne's written medical and family leave policies, undercuts rather than supports appellant's discrimination claims. The timing of the termination, without more, does not necessarily suggest that discriminatory acts had taken place or that the termination itself was discriminatory—even if the termination had been related to a period of limitations. Appellant's conclusory allegations concerning Bowne's alleged discriminatory motive for discharging her, unsupported by any facts or competent evidence, raise no triable issues of material fact regarding the reasons for her termination.

3. Disability and Worker's Compensation Benefits

Apart from her discharge, the only other misconduct appellant claims to have occurred within the statutory limitations period are Bowne's alleged failure to assist her in obtaining disability benefits, and Bowne's alleged failure to provide her with worker's compensation claim forms. Appellant did not raise these allegations in her first amended complaint and sought to raise them for the first time in her opposition to the motion for summary judgment. Summary judgment must be directed to the issues presented in the complaint, and appellant may not raise these new allegations when opposing respondent's motion. (*Mars v. Wedbush Morgan Securities, Inc.* (1991) 231 Cal.App.3d 1608, 1613-1614 (*Mars*).

Moreover, these incidents are not actionable under FEHA. To maintain a cause of action for discrimination, appellant must show an adverse employment action taken against her because of her sex, race, or disability. (*Cucuzza, supra,* 104 Cal.App.4th at p. 1038.) An adverse employment action requires "'a materially adverse change in the terms of . . .employment.'" (*Thomas v. Department of Corrections* (2000) 77

Cal.App.4th 507, 510 (*Thomas*).) To constitute an adverse employment action, conduct must "'be more disruptive than a mere inconvenience or an alteration of job responsibilities. . . .' [Citation.]" (*Id.* at p. 511.) Appellant's allegations that she was denied assistance in obtaining disability or worker's compensation benefits are insufficient to establish a material adverse change in the terms of her employment. Moreover, appellant has failed to raise a factual issue that she was denied such assistance because of her race, sex or disability. She has offered no evidence showing that similarly situated male or non-Caucasian employees were offered such assistance while she was being denied it.

4. Continuing Violations Doctrine

Appellant claims that the continuing violations doctrine allows her to sue respondents for discriminatory acts that occurred before July 11, 2001 and that would otherwise be time barred. Appellant may not invoke the continuing violations doctrine because she has failed to raise a triable issue of fact that any actionable conduct occurred within the applicable limitations period between July 11, 2001 and July 16, 2001. As discussed, the only two events that occurred within this period, appellant's discharge and Bowne's purported failure to assist her in obtaining disability and worker's compensation benefits, are not actionable under FEHA. These incidents accordingly cannot serve as the basis for invoking the continuing violations doctrine. (*Morgan, supra,* 88 Cal.App.4th at p. 64.)

Appellant has also failed to submit sufficient evidence of a nexus between the alleged acts of harassment and discrimination that occurred outside the statutory limitations period and the purportedly actionable conduct that occurred within that period. Besides being separated in time by more than a year, the acts are not similar in kind, nor do they involve the same actors. The alleged acts of harassment and discrimination were purportedly done by appellant's supervisor and male co-workers in the pricing department, whereas appellant's termination and disability claims were

handled by Bowne's human resources department. Because the conduct that occurred within the limitations period is not sufficiently related to the alleged acts of harassment and discrimination that occurred 13 months earlier, the continuing violations doctrine cannot extend appellant's claims that are time barred.

3. Estoppel

Appellant contends that there are triable issues of material fact as to whether respondents should be estopped from asserting the statute of limitations. She claims that Wiedbusch told her in July or August 2000 to "take all the time you need" to get well, and that she refrained from filing from her lawsuit within the statutory period in reliance on that statement. There is no evidence that Wiedbusch made the statement to induce appellant to refrain from suing. Appellant did not discuss a proposed lawsuit, or any of her alleged grievances, when she met with Wiedbusch in the summer of 2000. Nor could appellant reasonably have relied upon Wiedbusch's statement as the basis for not filing her lawsuit sooner. (See *Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 990-991 [boyfriend's promise to support plaintiff if they broke up, not conditioned upon plaintiff's refraining from initiating litigation, was not reasonable basis for detrimental reliance for purposes of avoiding statute of limitations].) Appellant has raised no triable issues with regard to estoppel.

Appellant's causes of action for sexual harassment, sex, race and disability discrimination are time barred. Her failure to submit sufficient evidence for a triable issue of fact concerning any actionable conduct during the relevant statutory time period from July 11, 2001 to July 16, 2001 precludes her from invoking the continuing violations doctrine. Respondents were accordingly entitled to summary adjudication on the causes of action for harassment and discrimination under FEHA.

C. Failure To Prevent Discrimination and Harassment Under FEHA

To maintain a cause of action under FEHA for failure to prevent discrimination and harassment, a plaintiff must first establish the existence of actionable harassment or discrimination. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 289.) As discussed, appellant has failed to submit sufficient evidence of a trial issue of fact concerning any actionable discrimination or harassment. Her cause of action for failure to prevent discrimination and harassment therefore fails as a matter of law. (*Ibid.*) Appellant's cause of action for failure to prevent discrimination and harassment against respondent Wiedbusch fails also because the statute imposes no such duty on a supervisory employee. (*Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1326.) Summary adjudication on this cause of action was proper.

D. FEHA Retaliation Claim

Appellant contends that triable issues of material fact exist as to whether Bowne unlawfully terminated her employment because she opposed Bowne's alleged fraudulent billing practices and failure to pay overtime, and because she complained of harassment and discrimination. Appellant's claim for retaliation fails as a matter of law because she did not establish a prima facie case of retaliation and because she did not produce specific, substantial responsive evidence that Bowne's stated reason for terminating her employment was a pretext. (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735.)

Government Code section 12940, subdivision (h) makes it unlawful for any employer "to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." Subdivision (a) of the statute specifies the unlawful employment practices that are prohibited, including sexual harassment, and discrimination because of race, sex, religion or national origin.

To establish a prima facie case of retaliation in violation of FEHA, a plaintiff must show that he or she engaged in a protected activity, that the employer subjected the employee to an adverse employment action, and that a causal link exists between the protected activity and the adverse action. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614.) Once a prima facie case has been established, the burden shifts to the employer to offer a legitimate non-retaliatory explanation for its conduct. If the employer offers a legitimate, non-retaliatory reason, the burden then shifts back to the plaintiff to show that the employer's proffered explanation is merely a pretext for retaliation. (*Flait v. North American Watch* (1992) 3 Cal.App.4th 467, 476.)

Appellant's allegation that she was discharged for opposing alleged fraudulent billing practices and overtime violations was not raised in her first amended complaint and cannot be raised for the first time in opposition to a motion for summary judgment. (*Mars, supra,* 231 Cal.App.3d at pp. 1613-1614.) Nor does this allegation establish a FEHA violation. Fraudulent billing practices and failure to pay overtime are not prohibited practices under FEHA, and appellant's opposition to such practices therefore cannot serve as the basis for a FEHA retaliation claim. (Gov. Code, § 12940, subds. (a), (h).) Sex and race discrimination are prohibited practices under the statute; however, appellant does not claim to have complained about discrimination to anyone in Bowne's human resources department; thus, her discharge could not have been in retaliation for such complaints. Appellant concedes that she never complained about sexual harassment to her supervisor, Wiedbusch, or to anyone in Bowne's human resources department. Although she alleged in her declaration that she requested an off-site meeting with a human resources manager to complain about Wiedbusch, appellant stated that she cancelled the meeting when the manager insisted on meeting onsite. She claims she did resist alleged sexual advances by two co-workers; however, she fails to establish any causal link between those incidents, which occurred in 1997 and 1999, and her July 2001 termination. Appellant has therefore not submitted a prima facie case of retaliation.

Moreover, Bowne offered a legitimate, non-retaliatory reason for appellant's termination – her absence from work for thirteen months, with no indication that she would be able to return to work – and thereby shifted the burden to appellant to provide "substantial responsive evidence" that Bowne's reason was a pretext and that the real reason for terminating her was to retaliate for her complaints. (*Martin v. Lockheed Missiles & Space Co., supra,* 29 Cal.App.4th at p. 1735.) Appellant failed to meet this burden. She claims that Bowne's reason for terminating her was pretextual because her unpaid leave of absence did not cost Bowne anything and that Bowne accordingly derived no economic benefit from terminating her employment. She further contends that her leave of absence violated no express company policy or procedure regarding unpaid leave time and that her termination was "orchestrated" by Bowne's lawyers because she was not discharged until after the one-year limitations period had run on her FEHA claims. These arguments fail to establish any retaliatory reason for her discharge, however, and are insufficient to negate Bowne's legitimate reason for doing so.

Summary judgment was properly granted on appellant's cause of action for retaliation.

E. Wrongful Termination

Appellant argues that her common law cause of action for wrongful termination should survive summary judgment because she raised triable issues of material fact as to whether she was discharged because she opposed Bowne's alleged fraudulent billing and unlawful overtime practices and because she complained about harassment and discrimination. Appellant also argues that Bowne unlawfully terminated her employment in violation of the Family Medical Leave Act and the California Family Rights Act and that she was entitled to additional unpaid leave time pursuant to those statutes.

To establish a cause of action for wrongful termination, a plaintiff must show that he or she was wrongfully discharged in violation of a substantial public policy. (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1256 (*Turner*), overruled on another

ground in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, 498.) In addition, the plaintiff must show a sufficient nexus between the employee's protected activity and the adverse action taken against the employee; e.g., that the plaintiff was discharged *because of* his or her refusal to commit unlawful acts. (*Turner, supra,* at pp. 1258-1259.)

Appellant made no complaints to anyone in Bowne's human resources department, as required by Bowne's sexual harassment policy about sexual harassment or discrimination during her employment at Bowne, and there is no evidence that Bowne's human resources personnel were aware of her grievances. Her termination occurred more than a year after her complaints of sexual harassment to her coworkers. Thus, she has not provided enough evidence to establish any nexus between the alleged complaints of harassment and her termination. Appellant made no allegations in her first amended complaint concerning Bowne's overtime practices or alleged violation of the Family Medical Leave Act and California Family Rights Act, but instead sought to raise these claims for the first time in her opposition to the motion for summary judgment. Summary judgment must be directed to the issues presented in the complaint, and appellant may not raise these new allegations in opposition to respondent's motion. (*Residential Capital, LLC v. Cal-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 829 [opposition to a defendant's summary judgment motion may not raise issues outside the pleadings and are not a substitute for an amendment to the pleadings]; *Mars, supra,* 231 Cal.App.3d at pp.1613-1614.)

Appellant has failed to show a sufficient nexus between her discharge, following a 13-month leave of absence during which she repeatedly told Bowne that she would be unable to return to work, and her complaints about Bowne's alleged fraudulent billing practices. (*Turner, supra,* 7 Cal.4th 1258-1259 [employee failed to show sufficient nexus between alleged "whistle-blowing" and subsequent negative performance evaluations].)[3]

[3] Because we conclude that appellant failed to show the requisite nexus between her complaints and her discharge, we need not decide whether appellant's wrongful termination claim also fails because she did not cite the specific statutory provisions upon which she based the public policy element of her claim. (See *Turner, supra,* 7 Cal.4th at

Summary judgment was properly granted on appellant's cause of action for wrongful termination in violation of public policy.

F. Intentional Infliction of Emotional Distress

Appellant's claim for intentional infliction of emotional distress was barred in significant part by the applicable one-year statute of limitations set forth in former Code of Civil Procedure section 340, subdivision (3). The applicable provisions of that statute were reenacted in 2002 as a two-year limitations period in Code of Civil Procedure section 335.1 that went into effect in 2003. (See *Moore v. State Board of Control* (2003) 112 Cal.App.4th 371, 379 [general rule is against retroactive application of amended statute of limitations absent clear indication of legislative intent to the contrary].) All of the allegedly harassing and discriminatory conduct cited by appellant occurred before her June 2000 leave of absence. Appellant did not initiate the instant action until July 11, 2002. The only conduct that is not time barred, Bowne's termination of appellant's employment, does not support a cause of action for intentional infliction of emotional distress. As discussed, Bowne presented a legitimate, non-discriminatory, non-retaliatory reason for terminating appellant's employment. An employer's act of simply terminating an employee does not give rise to a claim for intentional infliction of emotional distress. (*Trerice v. Blue Cross of California* (1989) 209 Cal.App.3d 878, 883; *Buscemi v. McDonnel Douglas Corp.* (9th Cir. 1984) 736 F.2d 1348.)

Appellant's claim that Wiedbusch acted outrageously by falsely promising, in July or August 2000, to keep her job available throughout her leave of absence was also barred by the one-year statute of limitations. (Former Code Civ. Proc., 340, subd. (3).) Moreover, a fraudulent misrepresentation alone is insufficient to support a cause of action

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p. 1257 [vague charges of illegal activities, "unaccompanied by citations to specific statues or constitutional provisions[,]" insufficient to support claim of wrongful termination as a violation of public policy].)

for intentional infliction of emotional distress. (See *Standard Wire & Cable Co. v. AmeriTrust Corp.* (C.D.Cal. 1988) 697 F.Supp. 368, 372 [applying California law, court held that the defendants' making fraudulent misrepresentations to induce the plaintiff to enter into a contract insufficient to sustain a cause of action for intentional infliction of emotional distress; the defendants' "conduct did not include threats of physical harm, public harassment or other such conduct which the cases require to be deemed 'extreme and outrageous'"].)

Summary judgment was properly granted on the cause of action for intentional infliction of emotional distress.

G. Negligent Infliction of Emotional Distress

Appellant's claim for negligent infliction of emotional distress was barred both by the applicable one-year statute of limitations (former Code Civ. Proc. § 340, subd. (3)), and by the exclusivity provisions of the Workers' Compensation Act (Lab. Code, §§ 3600, 3602; *Pichon v. Pacific Gas & Electric Co.* (1989) 212 Cal.App.3d 488, 494.)

"Subject to certain narrowly defined exceptions, the California Workers' Compensation Act provides the exclusive remedy for injuries arising within the course of employment." (*Pichon v. Pacific Gas & Electric Co., supra,* 212 Cal.App.3d at p. 494.) The relevant statutory provisions governing the exclusivity of workers' compensation are Labor Code sections 3600 and 3602. Labor Code section 3600 imposes upon employers "[l]iability for the compensation provided by this division, in lieu of any other liability whatsoever . . . for any injury sustained by his or her employees arising out of and in the course of employment. . ." Labor Code section 3602 provides that where the conditions of compensation occur, worker's compensation "is the sole and exclusive remedy" for an employee in an action against the employer.

Apart from appellants' July 2001 termination, all of the alleged harassing and discriminatory acts by respondents were barred by the one-year statute of limitations set forth in former Code of Civil Procedure section 340, subdivision (3). Appellant can

therefore maintain a cause of action for emotional distress injury only to the extent such injury results from the termination of her employment. Emotional distress caused by the termination of employment is an injury arising within the course and scope of employment subject to the exclusive remedy provisions of the Workers' Compensation Act. (*Pichon v. Pacific Gas & Electric Co., supra,* 212 Cal.App.3d at p. 496.) Appellant's only recourse for seeking redress for her claim of negligent infliction of emotional distress is the Workers' Compensation Act. Summary judgment was properly granted on the cause of action for negligent infliction of emotional distress.

H. Status of Bowne & Co., Inc.

The parties argue over whether summary judgment was properly granted in favor of respondent Bowne & Co., Inc. because, as a matter of law, Bowne & Co., Inc. was not appellant's employer. The trial court did not decide this issue. ~(CT 6:1402-1410)~ We need not decide this issue on appeal because we conclude that summary judgment was properly granted for the reasons discussed.

I. Alleged Procedural Error

Appellant claims the trial court abused its discretion by granting summary judgment solely because appellant failed to provide an adequate separate statement of disputed and undisputed material facts in opposition to respondents' motion. Because our independent review of the record, including appellant's declaration, shows that appellant failed to raise any triable issue of material fact concerning her claims, we need not reach the issue of whether the trial court abused its discretion by disregarding appellant's separate statement and declaration[4].

[4] The parties fully briefed the issues on the merits. It also appears that the trial court addressed the merits.

J. Attorney Fees

Respondents request an award of their attorney fees incurred in responding to this appeal, citing Government Code section 12965, subdivision (b) and *Carole Ring & Associates v. Nicastro* (2001) 87 Cal.App.4th 253 as support for such award. *Carole Ring & Associates v. Nicastro, supra,* 87 Cal.App. 253 involved a contractual attorney fee provision and an attorney fee award under a different statute. It is therefore inapposite. Government Code section 12965, subdivision (b) gives a court discretion to award attorney fees and costs to a prevailing party under FEHA: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity." Under FEHA, attorney fees should be awarded to a prevailing defendant """"only where the action brought is found to unreasonable, frivolous, meritless or vexatious,"""" and "'the term "meritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case . . .'" (Citation.)"" (*Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 831.) Under the foregoing standard, we decline to award attorney fees and costs to respondents pursuant to Government Code section 12965, subdivision (b). Although appellant did not prevail, her appeal was neither frivolous nor unreasonable.

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

MOSK, J.

We concur.

TURNER, P.J.

GRIGNON, J.